Ketua Pengarah Dalam Negeri v Kind Action (M) Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-18–05 OF 2024(J)
TENGKU MAIMUN CHIEF JUSTICE, RHODZARIAH BUJANG AND ABU BAKAR JAIS FCJJ
13 MARCH 2025

Civil Procedure — Judicial review — Availability of domestic remedy — Respondent sold plantation lands and paid real property gains tax but Director General of Inland Revenue ('DGIR') still raised additional assessment and imposed income tax — Respondent filed judicial review application against DGIR's decision — High Court found in favour of DGIR — Court of Appeal reversed High Court's decision — Whether High Court judge erred in concluding that proper forum was the Special Commissioner of Income Tax and in taking contradictory stand by dealing with the merits herself — Whether availability of domestic remedy would bar application for judicial review — Rules of Court 2012 O 53

Revenue Law — Imposition of — Double taxation — Respondent sold plantation lands and paid real property gains tax but Director General of Inland Revenue ('DGIR') still raised additional assessment and imposed income tax — Respondent filed judicial review application against DGIR — High Court found in favour of DGIR — Court of Appeal reversed High Court's decision — Whether assessment under Real Property Gains Tax Act 1976 ('the RPGTA') was final and conclusive — Whether DGIR's action illegal and contrary to principle against double taxation — Whether principle of estoppel should apply against DGIR — Income Tax Act 1967 ss 4(a) & 91 — Real Property Gains Tax Act 1976 ss 14(1)(a), (b), 20(1) & (2)

The respondent was a company which involved in the plantation business whilst the appellant was the Director General of Inland Revenue. Between the year of 2007 and 2017, the respondent had sold its plantation lands to various parties. In respect of these disposals of the lands, the respondent paid the real property gains tax ('the RPGT') under the Real Property Gains Tax Act 1976 ('the RPGTA'). The RPGTA assessments and the RPGT certificates were issued by the appellant's Cawangan Pembayar Cukai Besar and Cawangan Kluang. Despite the respondent having paid the RPGT, the appellant had raised notices of additional assessment for year assessment of 2010, 2015 and 2018 upon the respondent, imposing income tax and 60% penalties totalling more than RM81m ('the disputed notices'). In this regard, the appellant took the position that the proceeds from the respondent's realisation of its

investments in the plantation lands was subject to income tax under s 4(a) of the Income Tax Act 1967 ('the ITA'). Aggrieved, the appellant filed an appeal to the Special Commissioner of Income Tax ('the SCIT') and also judicial review proceedings in the High Court. The High Court found in favour of the appellant but on appeal, the Court of Appeal reversed the High Court's decision. In gist, the Court of Appeal found that: (a) the effect of the appellant's decision in issuing the disputed notices and in charging the respondent under both the RPGTA and the ITA amounted to an illegal act and contrary to the principle against double taxation and in this regard, the principle of estoppel should apply against the appellant; and (b) the High Court erred in concluding that the proper forum was SCIT and in taking a contradictory stand by dealing with the merits herself. Aggrieved, the appellant filed the present appeal. The leave of appeal was granted on seven questions of law. Questions 1, 2, 5, 6 and 7 generally concerned the finality of assessment under s 20 of the RPGTA; whether there was double taxation in view of s 20 of the RPGTA and the construction of s 91 of the ITA. Questions 3 and 4 dealt with the issue of availability of a domestic remedy.

Held, dismissing the appeal with costs and declining to answer the leave questions:

(1) **(per Tengku Maimun Chief Justice)** It was a trite principle of statutory construction that the courts would not read words into a statute. The words in s 20(1) of the RPGTA were clear. If there was no appeal by a taxpayer, and the circumstances stipulated under s 20(2) did not arise, the assessment under RPGTA was final and conclusive. In the present case, the appellant had accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and RPGTA assessments under s 14(1)(a) of the RPGTA. Since there were no appeals filed by the respondent and the circumstances stipulated under s 20(2) of the RPGTA did not arise, the assessments became final and conclusive under s 20 of the RPGTA (see paras 38–39 & 41–42).

(2) **(per Tengku Maimun Chief Justice)** The court agreed with the respondent that the RPGTA did not provide that the appellant could take the RPGT return 'on the surface' first and think about it later. In the court's view, it would be consistent with good governance that the appellant undertakes an investigation or audit first, before issuing the assessment. This would be consistent with the overall scheme of s 14(1) of the RPGTA which gave the discretion to the director general to either accept the return and make an assessment accordingly or make an assessment after making such adjustments as he considered necessary. The appellant's position to 'keep open the various alternatives' could not be accepted as that position amounted, in effect, to taxing the respondent under both the RPGTA and the ITA which was clearly prohibited under the law (see paras 47–48).

(3) **(per Tengku Maimun Chief Justice)** The appellant, under s 14(1)(b) of the RPGTA could have made the necessary adjustments before issuing the assessments under the RPGTA. They did not deem it necessary to do so. Instead, they issued the RPGTA certificate of clearance and assessments. Seven years later, the appellant issued notices/assessments under the ITA for the same transactions of the respondent's plantation lands. The earlier RPGTA certificate of clearance and the RPGTA assessments were not revoked. As found by the Court of Appeal, this in effect resulted in double taxation for the same land transactions but under two different legislations, ie once under the RPGTA and later under the ITA. This was clearly an illegality (see para 50).

(4) **(per Tengku Maimun Chief Justice)** Applying *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 and the other cases cited by the court, the appellant's certificate of clearance and assessments under the RPGTA which were never discharged or revoked, had created a legitimate expectation on the part of the respondent that they were correct and the appellant was estopped from shifting its position. And to the extent that *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685 ('Teruntum Theatre') and *Government of Malaysia v Sarawak Properties Sdn Bhd* [1994] 1 MLJ 14 decided that estoppel could not be invoked against the appellant, the court found that they were no longer good law. However, the decision in *Teruntum Theatre* that the appellant may issue assessment under the ITA if the facts and circumstances warranted it, but after discharging the assessment under the RPGTA, was consistent with numerous other cases. To that extent, *Teruntum Theatre* was still good law (see paras 60 & 73).

(5) **(per Tengku Maimun Chief Justice)** On alternative remedy, the Court of Appeal held that there was no acid test applicable in judicial review applications and that if a good case was brought before the court for review, for instance, if there was clear illegality on the part of the decision-making authority, then it was in the interest of justice that such application be allowed. The Court of Appeal found that on the facts of the present case, the decision of the appellant in issuing the disputed notices was tainted with illegality. The court was of the view that there was no error committed by the Court of Appeal in dismissing the appellant's contention that this was not a proper case for the respondent to bypass the avenue to appeal to SCIT. The finding of the Court of Appeal was supported by the authorities (see paras 74–75).

(6) **(per Tengku Maimun Chief Justice)** In conclusion, the court found no appealable error by the Court of Appeal that warranted the appellate intervention. The effect of the appellant's decision in issuing the disputed notices and in charging the respondent under both the RPGTA and the

ITA amounted to an illegal act and contrary to the principle against double taxation. The court agreed with the Court of Appeal that the principle of estoppel should apply against the appellant. The court further agreed with the Court of Appeal that the High Court judge erred in concluding that the proper forum was SCIT and in taking a contradictory stand by dealing with the merits herself. Having found that the merits were appropriately for the SCIT to determine, the High Court should not have proceeded to decide on the issues of negligence, limitation and sinister or bad faith (see paras 81–82).

(7) **(per Abu Bakar Jais FCJ, supporting)** Since the appellant had accepted the RPGT returns filed by respondent and also issued RPGTA certificate of clearance, this would reflect that the appellant had acted on the basis of s 14(1)(a) of the RPGTA. Further, since there were no appeals filed by the respondent, the assessment became final and conclusive pursuant to s 20(1) of the RPGTA. Therefore, *estoppel in pais* (estoppel by words or conduct) would apply, preventing the appellant to impose the tax under the ITA. There would also be legitimate expectation that the respondent would not be required to pay further tax under the ITA. The action by the appellant in raising the disputed notices under the ITA whilst not discharging or revoking the earlier RPGTA certificate of clearance had resulted in the same land transactions being subjected to tax under the said two different legislations. Such action was clearly illegal and must amount to double taxation (see paras 87–92).

(8) **(per Abu Bakar Jais FCJ, supporting)** There was nothing in *Teruntum Theatre* to suggest that the RPGTA certificate of clearance and RPGTA assessments could be held in abeyance pending the court's final determination on whether the land transactions should be taxed under the RPGTA or the ITA, as contended by the appellant. The appellant's contention if accepted, would mean the finality provision in s 20(1) of the RPGTA on the assessment for RPGT was of no effect. In any event, there was no provision in the RPGTA that stipulated RPGTA certificate of clearance and RPGTA assessments could be held in abeyance (see paras 93–95).

(9) **(per Abu Bakar Jais FCJ, supporting)** The Court of Appeal was not in error in finding that the existence of a domestic remedy would not bar an application for judicial review. There was no requirement in O 53 of the Rules of Court 2012 that the availability of a domestic remedy would bar an application for judicial review. Therefore, there was no obligation for the respondent to go before the SCIT prior to seeking the appropriate remedy by way of judicial review before the High Court. Judicial review would still be applicable when there was excess or abuse of power. In the present case, there was indeed an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA,

having done so under the RPGTA. Therefore, the appellant should not be prohibited in applying for judicial review (see paras 96–99).

[**Bahasa Malaysia summary**

Responden merupakan sebuah syarikat yang terlibat dalam perniagaan perladangan manakala perayu merupakan Ketua Pengarah Hasil Dalam Negeri. Antara tahun 2007 dan 2017, responden telah menjual beberapa tanah ladangnya kepada pelbagai pihak. Berkenaan dengan pelupusan tanah-tanah tersebut, responden telah membayar cukai keuntungan harta tanah ('CKHT') di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('ACKHT'). Taksiran ACKHT dan sijil CKHT telah dikeluarkan oleh Cawangan Pembayaran Cukai Besar dan Cawangan Kluang perayu. Walaupun responden telah membayar CKHT, perayu telah mengemukakan notis taksiran tambahan untuk tahun taksiran 2010, 2015 dan 2018 ke atas responden, dengan mengenakan cukai pendapatan dan 60% penalti yang berjumlah lebih daripada RM81 juta ('notis-notis yang dipertikaikan tersebut'). Dalam hal ini, perayu mengambil pendirian bahawa hasil daripada realisasi pelaburan responden dalam tanah ladang tersebut adalah tertakluk kepada cukai pendapatan di bawah s 4(a) Akta Cukai Pendapatan 1967 ('ACP'). Terkilan, perayu memfailkan rayuan kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') dan juga prosiding semakan kehakiman di Mahkamah Tinggi. Mahkamah Tinggi membuat dapatan yang memihak kepada perayu namun atas rayuan, Mahkamah Rayuan membatalkan keputusan Mahkamah Tinggi. Pada dasarnya, Mahkamah Rayuan mendapati bahawa: (a) kesan keputusan perayu dalam mengeluarkan notis-notis yang dipertikaikan tersebut dan dalam mengenakan cukai ke atas responden di bawah kedua-dua ACKHT dan ACP adalah merupakan satu tindakan yang menyalahi undang-undang dan bertentangan dengan prinsip mengelakkan cukai berganda dan dalam hal ini, prinsip estoppel harus terpakai terhadap perayu; dan (b) Mahkamah Tinggi terkhilaf dalam membuat kesimpulan bahawa forum yang betul adalah PKCP dan dalam mengambil pendirian yang bercanggah dengan menangani sendiri merit kes tersebut. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Kebenaran rayuan telah diberikan atas tujuh persoalan undang-undang. Soalan 1, 2, 5, 6 dan 7 secara amnya berkaitan dengan kemuktamadan taksiran di bawah s 20 ACKHT; sama ada terdapat cukai berganda berdasarkan s 20 ACKHT dan tafsiran s 91 ACP. Soalan 3 dan 4 membincangkan isu ketersediaan remedi domestik.

Diputuskan, menolak rayuan dengan kos dan mahkamah enggan menjawab soalan-soalan undang-undang yang dibangkitkan:

(1) **(Tengku Maimun Ketua Hakim Negara)** Adalah menjadi prinsip asas bagi pentafsiran statutori bahawa mahkamah tidak akan membaca perkataan ke dalam statut. Perkataan dalam s 20(1) ACKHT adalah jelas. Jika tiada rayuan oleh pembayar cukai, dan keadaan yang dinyatakan di

bawah s 20(2) tidak timbul, taksiran di bawah ACKHT adalah muktamad dan konklusif. Dalam kes semasa, perayu telah menerima penyata CKHT yang difailkan oleh responden dan mengeluarkan sijil pelepasan ACKHT dan taksiran ACKHT di bawah s 14(1)(a) ACKHT. Memandangkan tiada rayuan yang difailkan oleh responden dan keadaan yang dinyatakan di bawah s 20(2) ACKHT tidak timbul, taksiran tersebut menjadi muktamad dan konklusif di bawah s 20 ACKHT (lihat perenggan 38–39 & 41–42).

(2) **(Tengku Maimun Ketua Hakim Negara)** Mahkamah bersetuju dengan responden bahawa ACKHT tidak memperuntukkan bahawa perayu boleh mengambil penyata CKHT 'on the surface' terlebih dahulu dan memikirkannya kemudian. Pada pandangan mahkamah, adalah selaras dengan tadbir urus yang baik bahawa perayu menjalankan siasatan atau audit terlebih dahulu, sebelum mengeluarkan taksiran. Ini selaras dengan skema keseluruhan s 14(1) ACKHT yang memberikan budi bicara kepada ketua pengarah sama ada untuk menerima penyata dan membuat taksiran sewajarnya atau membuat taksiran selepas membuat pelarasan yang difikirkannya perlu. Pendirian perayu untuk 'keep open the various alternatives' tidak boleh diterima kerana pendirian tersebut, pada dasarnya, bersamaan dengan mengenakan cukai kepada responden di bawah ACKHT dan ACP yang jelas dilarang di bawah undang-undang (lihat perenggan 47–48).

(3) **(Tengku Maimun Ketua Hakim Negara)** Perayu, di bawah s 14(1)(b) ACKHT boleh membuat pelarasan yang diperlukan sebelum mengeluarkan taksiran di bawah ACKHT. Namun, perayu tidak menganggap perlu untuk berbuat demikian. Sebaliknya, perayu mengeluarkan sijil pelepasan dan taksiran ACKHT. Tujuh tahun kemudian, perayu mengeluarkan notis/taksiran di bawah ACP untuk transaksi tanah-tanah ladang responden yang sama. Sijil pelepasan ACKHT dan taksiran ACKHT yang terdahulu tidak dibatalkan. Seperti yang didapati oleh Mahkamah Rayuan, ini sebenarnya mengakibatkan cukai berganda untuk transaksi tanah yang sama tetapi di bawah dua perundangan yang berbeza, iaitu sekali di bawah ACKHT dan kemudian di bawah ACP. Ini jelas merupakan satu kepenyalahan undang-undang (lihat perenggan 50).

(4) **(Tengku Maimun Ketua Hakim Negara)** Mengguna pakai *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 dan kes-kes lain yang dipetik oleh mahkamah, sijil pelepasan dan taksiran perayu di bawah ACKHT yang tidak pernah dilepaskan atau dibatalkan, telah mewujudkan jangkaan yang sah di pihak responden bahawa ia adalah betul dan perayu telah dihalang daripada mengubah kedudukannya. Dan setakat mana *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685

('Teruntum Theatre') dan *Government of Malaysia v Sarawak Properties Sdn Bhd* [1994] 1 MLJ 14 memutuskan bahawa estoppel tidak boleh digunakan terhadap perayu, mahkamah mendapati bahawa ia bukan lagi undang-undang yang baik. Walau bagaimanapun, keputusan *Teruntum Theatre* bahawa perayu boleh mengeluarkan taksiran di bawah ACP jika fakta dan keadaan mewajarkannya, tetapi selepas melepaskan taksiran di bawah ACKHT, adalah konsisten dengan pelbagai kes lain. Setakat itu, *Teruntum Theatre* masih merupakan undang-undang yang baik (lihat perenggan 60 & 73).

(5) **(Tengku Maimun Ketua Hakim Negara)** Mengenai remedi alternatif, Mahkamah Rayuan memutuskan bahawa tiada ujian asid yang terpakai dalam permohonan semakan kehakiman dan jika kes yang bagus dibawa ke mahkamah untuk semakan, contohnya, jika terdapat kepenyalahan undang-undang yang jelas dilakukan oleh pihak berkuasa yang membuat keputusan, maka adalah demi kepentingan keadilan permohonan tersebut dibenarkan. Mahkamah Rayuan mendapati bahawa berdasarkan fakta kes semasa, keputusan perayu dalam mengeluarkan notis-notis yang dipertikaikan tersebut telah dicemari dengan kepenyalahan undang-undang. Mahkamah berpendapat bahawa tiada kekhilafan yang dilakukan oleh Mahkamah Rayuan dalam menolak hujah perayu bahawa ini bukanlah kes yang wajar bagi responden untuk memintas jalan untuk merayu kepada PKCP. Dapatan Mahkamah Rayuan disokong oleh autoriti kes (lihat perenggan 74–75).

(6) **(Tengku Maimun Ketua Hakim Negara)** Kesimpulannya, mahkamah tidak mendapati apa-apa kekhilafan yang boleh dirayu yang dibuat oleh Mahkamah Rayuan yang mewajarkan campur tangan rayuan. Kesan keputusan perayu dalam mengeluarkan notis-notis yang dipertikaikan tersebut dan dalam mengenakan cukai ke atas responden di bawah kedua-dua ACKHT dan ACP adalah merupakan satu tindakan yang menyalahi undang-undang dan bertentangan dengan prinsip mengelak cukai berganda. Mahkamah bersetuju dengan Mahkamah Rayuan bahawa prinsip estoppel harus terpakai terhadap perayu. Mahkamah selanjutnya bersetuju dengan Mahkamah Rayuan bahawa hakim Mahkamah Tinggi terkhilaf dalam membuat kesimpulan bahawa forum yang betul adalah PKCP dan dalam mengambil pendirian yang bercanggah dengan mengendalikan sendiri merit kes tersebut. Setelah mendapati bahawa merit tersebut adalah wajar untuk ditentukan oleh PKCP, Mahkamah Tinggi tidak sepatutnya meneruskan dengan membuat keputusan mengenai isu kecuaian, had masa dan sinister atau niat jahat (lihat perenggan 81–82).

(7) **(oleh Abu Bakar Jais HMP, menyokong)** Memandangkan perayu telah menerima penyata CKHT yang difailkan oleh responden dan juga mengeluarkan sijil pelepasan ACKHT, ini akan mencerminkan bahawa

perayu telah bertindak berdasarkan s 14(1)(a) ACKHT. Tambahan pula, memandangkan tiada rayuan yang difailkan oleh responden, taksiran tersebut menjadi muktamad dan konklusif menurut s 20(1) ACKHT. Oleh itu, estoppel in pais (estoppel melalui perkataan atau kelakuan) akan terpakai untuk menghalang perayu daripada mengenakan cukai di bawah ACP. Terdapat juga jangkaan yang sah bahawa responden tidak akan dikehendaki membayar cukai selanjutnya di bawah ACP. Tindakan oleh perayu dalam membangkitkan notis-notis yang dipertikaikan tersebut di bawah ACP tetapi tidak melepaskan atau membatalkan sijil pelepasan ACKHT terdahulu telah mengakibatkan transaksi tanah yang sama tertakluk kepada cukai di bawah dua perundangan berbeza. Tindakan sedemikian jelas menyalahi undang-undang dan haruslah berjumlah kepada cukai berganda (lihat perenggan 87–92).

(8) **(oleh Abu Bakar Jais HMP, menyokong)** Tiada apa-apa dalam *Teruntum Theatre* yang mencadangkan bahawa sijil pelepasan ACKHT dan taksiran ACKHT boleh ditangguhkan sementara menunggu keputusan muktamad mahkamah sama ada transaksi tanah harus dikenakan cukai di bawah ACKHT atau ACP, seperti yang dihujahkan oleh perayu. Hujah perayu jika diterima, bermakna peruntukan muktamad dalam s 20(1) ACKHT mengenai taksiran untuk CKHT tidak berkuat kuasa. Walau apa pun, tiada peruntukan dalam ACKHT yang menetapkan sijil pelepasan ACKHT dan taksiran ACKHT boleh ditangguhkan (lihat perenggan 93–95).

(9) **(oleh Abu Bakar Jais HMP, menyokong)** Mahkamah Rayuan tidak terkhilaf dalam memutuskan bahawa kewujudan remedi domestik tidak akan menghalang permohonan semakan kehakiman. Tiada peruntukan dalam A 53 Kaedah-Kaedah Mahkamah 2012 bahawa ketersediaan remedi domestik akan menghalang permohonan semakan kehakiman. Oleh itu, tiada kewajipan bagi responden untuk hadir di hadapan PKCP sebelum mendapatkan remedi yang sesuai melalui semakan kehakiman di hadapan Mahkamah Tinggi. Semakan kehakiman masih terpakai apabila terdapat lebihan atau penyalahgunaan kuasa. Dalam kes semasa, sememangnya terdapat lebihan atau penyalahgunaan kuasa kerana perayu tidak sepatutnya mengenakan cukai selanjutnya ke atas responden di bawah ACP, setelah berbuat demikian di bawah ACKHT. Oleh itu, perayu tidak sepatutnya dilarang memohon semakan kehakiman (lihat perenggan 96–99).]

Cases referred to

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (refd)

Bye (HM Inspector of Taxes) v Gershon and Muriel Coren (1986) 60 TC 116 (distd)

Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 MLJ 309, CA (folld)
Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 1229; [2021] 9 CLJ 918, HC (refd)
Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428, CA (refd)
Faekah bt Hj Husin & Ors v Menteri Besar Selangor (Pemerbadanan) [2021] 3 MLJ 893, FC (refd)
Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] MLJU 590; [2018] 7 CLJ 487, HC (refd)
Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] CLJ Rep 110, SC (refd)
Government of Malaysia v Sarawak Properties Sdn Bhd [1994] 1 MLJ 14, HC (refd)
Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors [2017] 5 MLJ 116; [2017] 6 CLJ 161, CA (refd)
Jakinta Trading Sdn Bhd v Director General of Customs & Anor [2021] MLJU 832; [2021] 1 LNS 678, HC (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113, FC (refd)
Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 MLJ 493, CA (refd)
Landmark Property Sdn Bhd v Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor [2021] MLJU 2036; [2021] 10 CLJ 954, HC (refd)
Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, PC (refd)
Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447, HC (refd)
MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 7 MLJ 260, HC (refd)
National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi [2018] supp MLJ 293; [2011] 4 CLJ 729, FC (refd)
Preston v Inland Revenue Commissioners [1985] 2 All ER 327, HL (folld)
Regina v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd and others [1990] 1 WLR 1545, QBD (folld)

Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581, FC (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)

Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685; [2006] 3 CLJ 123, CA (refd)

Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 4(a), 91, 99

Real Property Gains Tax 1976 ss 13(1), 14, 14(1), (1)(a), (1)(b), (3), 20, 20(1), (2)

Rules of Court 2012 O 53

Ashrina bt Ramzan Ali (with Muhammad Farid bin Jaafar and Surani bt Che Ismail) (Inland Revenue Board of Malaysia) for the appellant.

Anand Raj (with Foong Pui Chi and Cheong Wen Yie) (Shearn Delamore & Co) for the respondent.

Nitin Nadkarni (Soon Jia Yin and Abhilaash Subramaniam) (Abhilaash Subramaniam & Co) for the amicus curiae.

Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is the Ketua Pengarah Hasil Dalam Negeri/Revenue's appeal against the decision of the Court of Appeal in reversing the judgment of the High Court. The High Court had decided in favour of the Revenue when it dismissed the respondent's application for judicial review.

[2] Having considered the written and oral submissions of parties, we unanimously dismissed the Revenue's appeal. We now provide our reasons.

BACKGROUND FACTS

[3] The respondent is in the plantation business. Its parent company is Revertex Malaysia Sdn Bhd ('RMSB'). The ultimate holding company of the respondent is the Synthomer Group, a company incorporated in the United Kingdom.

[4] Synthomer Group decided that RMSB was to focus on Synthomer Group's core business activity, namely manufacture, trade and sale in chemicals (ie synthetic resin and alkyd resin) and the respondent to carry out plantation

business previously carried out by RMSB. For this purpose, the respondent entered into a sale and purchase agreement dated 24 May 2004 with RMSB where plantation lands used by RMSB in Kluang, Johor were transferred to the respondent.

[5] The particulars of the lands are as follows:

(a) HS(D) 47663 Lot PTD 57386;

(b) HS(D) 47664 Lot PTD 57387; and

(c) HS(D) 47665 Lot PTD 57387 (collectively referred to as 'Mengkibol Estate').

[6] At all material times, the respondent derived its income from its plantation business which was conducted on the Mengkibol Estate. Mengkibol Estate has always been recognised in the respondent's audited account as a fixed asset for the relevant years of assessment. And the respondent has duly paid income tax upon the same.

[7] There was a change in the top management of the Synthomer plc, the ultimate holding company in the United Kingdom, and following the change, in 2007 the Synthomer Group made a strategic decision to streamline the business activity of the Group. Synthomer Group decided to withdraw from the plantation business altogether and focus on its chemical manufacturing business. Towards that end, the respondent was to realise its investments in Lots PTD 57386 and PTD 57387. Lot PTD 57386 and Lot PTD 57387 measuring 427 acres and 1471 acres respectively, were subsequently subdivided into smaller lots ('the plantation lands').

[8] In accordance with the decision of the holding company, ten transactions took place between 2007 and 2017 where the respondent, vide several sale and purchase agreements sold its plantation lands to various parties. In respect of these disposals of the lands, the respondent paid the real property gains tax under the Real Property Gains Tax Act 1976 ('the RPGTA'). The RPGTA assessments and the real property gains tax certificates were issued by the appellant's Cawangan Pembayar Cukai Besar and Cawangan Kluang.

[9] In October 2019, in the course of a tax investigation conducted by the appellant's branch in Melaka, the appellant took the position that the proceeds from the respondent's realisation of its investments in the plantation lands is subject to income tax under s 4(a) of the Income Tax Act 1967 ('the ITA'). This is based on, among others, that the respondent's activities of realising its investments were in the nature of trade.

[10] The appellant raised Notices of Additional Assessment dated 3 December 2020 for Year Assessments of 2010, 2015 and 2018 upon the respondent, imposing income tax and 60% penalties totaling more than RM81m ('disputed notices'). The appellant did not discharge or revoke the earlier RPGTA certificate of clearance and RPGTA assessments in respect of the same transactions.

[11] The respondent contended that by not discharging or revoking the earlier RPGT certificate of clearance and assessments, the appellant's conduct is illegal and contrary to the principle against double taxation.

[12] The respondent filed an appeal under Forms Q to the Special Commissioner of Income Tax ('SCIT') and also judicial review proceedings in the High Court. Via the judicial review, the respondent sought for the following reliefs:

(a) an order for certiorari to quash the Notices of Additional Assessment for Year Assessment 2010, 2015 and 2018 issued by the Revenue under the ITA;

(b) a declaration that the notices are invalid in law; and

(c) a declaration that the Revenue is bound by its action in recognising, accepting and acknowledging that the profit (if any) from the realisation of investments of the plantation lands are subjected to RPGTA and thus the Revenue cannot impose tax on the respondent under the ITA.

PROCEEDINGS IN THE COURTS BELOW

[13] The following were the issues for determination by the High Court:

(a) whether the disputed notices for Year Assessment prior to 2015 were time-barred;

(b) whether the Revenue was bound by the RPGTA certificate of clearance;

(c) whether the Revenue had failed to give reasons for its decision;

(d) whether it was improper for the applicant to bypass the alternative remedy of appeal to the SCIT; and

(e) whether imposition of the penalty by the Revenue was correct.

[14] The High Court dismissed the respondent's judicial review application on the following grounds:

(a) the Revenue's additional assessments were not statutorily barred and as the respondent has negligently failed to furnish the proper information and to make the proper declaration to the Revenue, the respondent's plea

of limitation should be taken up before the Special Commissioners of the Income Tax ('SCIT');

(b) the respondent's plea of double taxation is not tenable as pursuant to s 91 of the ITA, the Revenue is given the power to make additional assessment; and because the Revenue had adjusted the RPGT payments made by the respondent;

(c) the Revenue had not acted in bad faith or had breached any rules of natural justice;

(d) that this was not a proper case to bypass the appeal to SCIT. Since the respondent had disputed the additional assessments, the issue of whether the gains from the disposal of the plantation lands should be subjected to the ITA would require a fact finding exercise by SCIT; and

(e) the imposition of penalty is linked to the facts of the case and the SCIT being judges of fact would be the appropriate forum to decide on the correctness of the penalty imposed.

[15] On appeal, the Court of Appeal found that the High Court had arrived at a wrong conclusion in dismissing the respondent's judicial review application. The respondent's appeal was therefore allowed. The findings of the Court of Appeal may be summarised as follows:

(a) no acid test is applicable in judicial review cases (be it exceptional circumstances/error of law/abuse of power) but if a good case is brought before the court for review then in the interests of justice, the application ought to be allowed;

(b) the Revenue has failed to act in accordance with the law. In failing or omitting to discharge or revoke the RPGTA certificate of clearance and assessments, it resulted in double taxation for the same land transactions under two different legislation ie the ITA and the RPGTA. The correct procedure in law was for the Revenue to discharge the assessments under the RPGTA and then raise the taxes under the ITA;

(c) based on established principles, the Revenue's discretion to impose taxes is not absolute and unfettered. The power of the courts is not ousted where the discretion is not exercised in accordance with the relevant law; and

(d) as the Revenue had already issued the RPGTA certificate of clearance and RPGTA assessments in respect of the same land transactions which are final and conclusive, the Revenue is bound by the certificate and the assessments, and the principle of estoppel should apply against the Revenue.

[16] The Court of Appeal also found that the High Court erred in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case but yet, in the same breadth, took a completely contradictory approach in her judgment by determining the merits of the appellant's claim.

[17] Dissatisfied with the decision of the Court of Appeal, the Revenue applied for leave to appeal to the Federal Court.

QUESTIONS OF LAW

[18] Leave to appeal was granted to the Revenue/appellant on the following questions of law:

(a) whether the Court of Appeal can extend the reading of s 20 of the Real Property Gains Tax 1976 ('the RPGTA') relating to appeal under the RGPTA on the assessment raised under the Income Tax Act 1967 ('the ITA');

(b) whether finality of assessment under s 20 of the RGPTA makes this appeal limited to RPGTA only or otherwise;

(c) whether the Court of Appeal has jurisdiction to make findings of facts in a judicial review when the jurisdiction to find facts is vested in the Special Commissioners of Income Tax ('SCIT');

(d) whether disputes relating to the merits of assessment raised under a taxing legislation involving question of law or mixed questions of law and facts may be determined by way of judicial review:

(e) whether the appellant as a statutory body can be estopped from exercising its statutory duty under the tax laws;

(f) whether the appellant can raise tax assessment under the ITA in exercising its statutory duty despite the self-declaration by the respondent under the RGPTA; and

(g) whether there exists double taxation under the ITA and RPGTA.

[19] Questions 1, 2, 5, 6 and 7 generally concerned the finality of assessment under s 20 of the RPGTA; whether there was double taxation in view of s 20 of the RPGTA and the construction of s 91 of the ITA. Questions 3 and 4 dealt with the issue of availability of a domestic remedy.

SUBMISSIONS OF PARTIES

[20] Essentially, it was the submission of learned counsel for the appellant that the appellant is allowed to take the RPGT return forms submitted by the

respondent under s 13(1) of the RPGTA 'on the surface' and issued the RPGTA certificate of clearance and RPGTA assessments on that basis.

[21] Learned counsel further submitted that no audit was carried out under the RPGTA and that the clearance was issued based on the respondent's forms. However, subsequently, when audit investigation was carried out on the respondent, the true nature of the transaction came to light and the appellant found that the disposal of the plantation lands should be reported under the ITA instead of the RPGTA. This is because the facts on the whole show that the respondent's land transactions comply with badges of trade and are thus gains under the ITA.

[22] It was further submitted by learned counsel for the appellant that what was final and conclusive under s 20 of the RPGTA is the amount of real property gains tax assessed under the RPGTA. Since the issue whether the gain is chargeable to income tax or real property gains tax had not been determined yet, there is no finality of the assessment under the RPGTA in this case. Learned counsel relied on the case of *Bye (HM Inspector of Taxes) v Gershon and Muriel Coren* (1986) 60 TC 116 ('Bye') to argue that the appellant is not precluded from raising an assessment under the ITA after the finalisation of the capital gains tax.

[23] Learned counsel for the appellant contended that the issue of subjecting the respondent to both taxes and the issue of double taxation did not arise because the respondent has not been charged for both the real property gains tax and the income tax. In her own words as captured in the written submission:

> The income tax assessments are alternative to the capital gains tax assessment.
>
> No one has ever supposed for a moment that the Appellant were intending to levy double taxation or doing anything other than keep open the various alternatives until the uncertainties ... had been determined.

[24] Learned counsel also highlighted that the appellant had made the necessary adjustments after considering the RPGT payments made by the respondent and that there is no rule of law which precluded the appellant from proceeding to raise assessments under the ITA after the capital gains tax assessments had become final. According to learned counsel, there is 'no rule that the same sum cannot be subject to two separate taxes'.

[25] Learned counsel argued that the appellant has the right and power to review and revise any assessment raised under RPGT. *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685; [2006] 3 CLJ 123 ('Teruntum Theatre') and *MR Properties Sdn Bhd v Ketua Pengarah Hasil*

A *Dalam Negeri* [2005] 7 MLJ 260 ('MR Properties') were cited to support her arguments.

[26] As regards legitimate expectation and estoppel, it was argued for the appellant that it cannot be estopped from discharging its statutory duty. Learned counsel highlighted the decision of the Court of Appeal in *Teruntum Theatre* that estoppel cannot be invoked against the DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA. Various cases including *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 4 CLJ 729, *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116; [2017] 6 CLJ 161 were cited in support of her submissions on legitimate expectation. Learned counsel had also submitted that complaints on legitimate expectation are matters that should be raised and determined by the SCIT.

[27] On the issue of availability of a domestic remedy, learned counsel for the appellant submitted that as s 99 of the ITA provides for a right to appeal to the SCIT against an assessment, the respondent must avail itself of this remedy and thus it is not competent for the respondent to pursue judicial review. Reliance was placed on among others, *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 ('Jagdis Singh'). Learned counsel argued that whether tax under the RPGTA or the ITA should be imposed on the respondent involves finding of fact by the SCIT.

[28] As regards the decision of the Court of Appeal that the High Court erred in finding that the proper forum is SCIT but at the same time the High Court determined the merits of the appellant's case, learned counsel cited the decision of this court in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 ('Alcatel-Lucent'). She argued that *Alcatel-Lucent* is the authority to support the proposition that although the courts have decided on the merits, the matter or the merits could still be ventilated before the SCIT.

[29] In response to the appellant's submissions on questions 1, 2, 6 and 7, learned counsel for the respondent argued that the 'on the surface' approach is not supported by law and in taking that 'on the surface' approach, the appellant is ignoring their statutory duty under s 14 of the RPGTA which requires the appellant to consider the contents of the taxpayer's return first in order to decide whether to accept it or make adjustments to it and thereafter raised the assessment. Having raised the assessment and there being no appeal by the respondent, the appellant's assessment under the RPGTA was final and conclusive.

[30] Further, having raised the disputed notices under the ITA and not having discharged or revoked the earlier RPGTA certificate of clearance and the RPGTA assessments, the appellant has sought to impose liability under both the RPGTA and the ITA which is contrary to law. This, contended learned counsel, is an illegal act on the part of the appellant which amounts to exceptional circumstances enabling the respondent to pursue judicial review. Learned counsel similarly relied on *Teruntum Theatre* and *Jagdis Singh*. It was submitted that the conduct and/or decision of the appellant is tainted with illegality and on this ground alone, the appellant's appeal should be dismissed.

[31] On question 5, learned counsel for the respondent submitted among others that the RPGTA certificate of clearance and RPGTA assessments were issued by the Revenue over a period of seven years from 2011 to 2018. This, contended learned counsel, shows that the respondent has been given the assurance and confirmation multiple times by the appellant that all the transactions were indeed capital in nature and any reasonable taxpayer would rely upon such repeated and consistent assurances of the appellant. Learned counsel argued that this has created a legitimate expectation on the part of the respondent that the certificate of clearance and the assessments under the RPGTA are correct and that the DGIR will not resile from his position. Numerous cases were cited in support thereof including *Regina v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd and others* [1990] 1 WLR 1545 ('MFK Underwriting') and *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 ('Darahman').

[32] Learned counsel for the respondent also highlighted that the case of *Darahman* has been recently applied by the High Court against Malaysian taxing authorities. The High Court decisions are *Landmark Property Sdn Bhd v Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri & Anor* [2021] MLJU 2036; [2021] 10 CLJ 954; and *Jakinta Trading Sdn Bhd v Director General of Customs & Anor* [2021] MLJU 832; [2021] 1 LNS 678. Applying these cases, learned counsel submitted that the fact that the appellant had issued the RPGTA certificate of clearance and assessments over a period of seven years clearly created a legitimate expectation that the disposals of the respondent's plantation lands are subject to real property gains tax under the RPGTA and as such, it would be unfair for the appellant to now shift their position and unlawfully tax the respondent again under the ITA.

[33] On the principle that there can be 'no estoppel', learned counsel accordingly submitted that the Court of Appeal was correct in law in holding that estoppel should apply against the appellant. It was also highlighted by learned counsel that the law on estoppel has evolved.

[34] The respondent also argued that the Court of Appeal was correct in finding that the High Court erred in law in holding that the SCIT is the proper forum under the provisions of the ITA to deal with the merits of the case, yet, proceeded to determine the merits of the appellant's claim.

[35] On the existence of a domestic remedy under the ITA, learned counsel for the respondent submitted that nowhere in O 53 is it stated that the existence of a domestic remedy will bar an application for judicial review. And that it would be wrong to insist on the exhaustion of a domestic remedy where there are errors of law or abuses of power that goes to the legality of the conduct of the decision-making authority. Learned counsel relied on *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113; *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447; *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2018] MLJU 590; [2018] 7 CLJ 487; *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1229; [2021] 9 CLJ 918.

[36] Learned counsel for the Malaysian Bar who appeared as *amicus curiae* addressed the following points in his written submission — whether and when different legislations can be construed together; whether and when the doctrine of estoppel can be applied against public authorities/statutory bodies, in this case, the Director General of Inland Revenue; whether and when double taxation arises under the ITA and the RPGTA; whether the superior courts' jurisdiction in judicial review proceedings is confined only to dealing with issues of law, or whether it can also address issues of facts or mixed issues of law and facts.

DECISION/ANALYSIS

Finality of the assessment and double taxation

[37] The relevant provisions of the RPGTA are ss 13(1), 14(1) and 20 as follows:

> 13 Returns
>
> (1) Every chargeable person who disposes of a chargeable asset and every person who acquires the asset so disposed of shall, within sixty days (or such further period as the Director General may allow on a written request being made to him) of the date of disposal of that asset, make a return —
>
> (a) specifying in respect of the asset disposed of the acquisition price, the disposal price and the gain or loss on the disposal;
>
> (b) furnishing all information necessary to determine the acquisition price and disposal price of the asset disposed of; and

(c) where the market value of the asset is to be taken for the purposes of this Act, submit a written valuation of the asset by a valuer.

...

14 Assessments

(1) Where a person makes a return under subsection 13(1), the Director General may —

(a) accept the return and make an assessment accordingly;

(b) make an assessment after making such adjustments as he considers necessary; or

(c) reduce an assessment made for the year of assessment for which the return was made, in giving effect to paragraph 7(4)(a).

...

20 Finality of assessment

(1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this Act as regards the amount of the tax assessed under it or the tax relief for allowable losses indicated in it, as the case may be —

(a) on the expiry of the time of appeal against the assessment; or

(b) where an appeal is made, on the appeal being finally disposed of.

(2) Subsection (1) —

(a) shall not apply to an assessment made under subsection 14(3) until it is adopted as the assessment for the year of assessment to which it relates;

(b) shall not prevent the Director General from making in respect of any year of assessment —

(i) an assessment under subsection 15(1) or (2); or

(ii) a revision under subsection 19(1).

[38] The appellant in this case had accepted the RPGT returns filed by the respondent and issued the RPGTA certificate of clearance and RPGTA assessments under s 14(1)(a) of the RPGTA. Since there were no appeals filed by the respondent, the assessments became final and conclusive under s 20. In fact, learned counsel for the appellant conceded that the assessment will become final and conclusive under s 20 of the RPGTA when no appeal is filed by a taxpayer after the DGIR issued an assessment under s 14(1) of the RPGTA. She argued however that the finality provision does not apply to an assessment made under s 14(3) until it is adopted as the assessment for the year of the assessment to which it relates.

[39] With respect, we found no merit in the submission of learned counsel for the appellant on s 14(3) of the RPGTA. In the course of the hearing, we

A sought clarification from her whether any of the scenarios under s 20(2) of the RPGTA apply to the respondent in the instant case. Her response was in the negative. Thus, pursuant to s 20(1), the assessments issued by the appellant are final and conclusive.

B **[40]** Learned counsel for the appellant had also submitted that the appellant can still tax the respondent for income under ITA after an audit is done even if tax or assessment for capital under the RPGTA is final and conclusive.

C **[41]** With respect, to accept the submission of learned counsel for the appellant would cause gross violation of the principle of double taxation and would run counter to the finality provision in s 20(1). The words in s 20(1) are clear. If there is no appeal by a taxpayer, and the circumstances stipulated under s 20(2) do not arise, the assessment under RPGTA is final and conclusive.

D

[42] It is a trite principle of statutory construction that the courts will not read words into a statute. The duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it (see *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; *Faekah bt Hj Husin & Ors v Menteri Besar Selangor (Pemerbadanan)* [2021] 3 MLJ 893).

E

F **[43]** In *Tebin bin Mostapa*, this court stated thus:

> ... the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute.

G

(See also *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 and *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299.)

H **[44]** Further, as submitted by learned counsel for the respondent, even if there is an ambiguity in the law, such ambiguity must be construed in favour of the taxpayer as decided in *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 ('Exxon Chemical'). In *Exxon Chemical*, Gopal Sri Ram JCA (as he then was) said:

I

> [10] ... the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision: no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99). The corollary of that proposition is

that those parts in a revenue statute that favour the taxpayer must be read literally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[45] In *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99, this court stated thus:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

[46] The words in s 20(1) are clear. As stated by the Supreme Court in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, the court is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavor to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. We therefore found no reason not to give effect to the clear words of 'final and conclusive' in s 20(1) of the RPGTA which mean what it says. The definiteness and certainty of the legal position must be maintained (see *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1).

[47] Learned counsel for the appellant also contended that the appellant is at liberty to take the return 'on the surface' and to 'keep open the various alternatives'. We agreed with the respondent that nowhere in the RPGTA is it provided that the appellant can take the RPGT return 'on the surface' first and think about it later. In our view, it would be consistent with good governance that the appellant undertakes an investigation or audit first, before issuing the assessment. This would be consistent with the overall scheme of s 14(1) of the RPGTA which gives the discretion to the Director General to either accept the return and make an assessment accordingly or make an assessment after making such adjustments as he considers necessary.

[48] The appellant's position to 'keep open the various alternatives' cannot be accepted as that position amounted, in effect, to taxing the respondent under both the RPGTA and the ITA. The law clearly prohibits the appellant from taking that course of action. As observed by Raus Sharif J (as His Lordship then was) in *MR Properties*: 'the act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction'. To 'keep open the various alternatives' would also result in a perpetual uncertainty in tax position. To our mind, this cannot be the intention of Parliament having regard

to the final and conclusive provision in the law.

[49] At this juncture, it is perhaps pertinent to cite Edgar Joseph Jr FCJ in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105, where he referred to the judgment of the High Court in the same case:

> ... The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfill the collection of certain publicly declared targeted amount of taxes and whose assessments, as a result may be influenced by the target to be achieved rather than the correctness of the assessment.

[50] In the instant case, the appellant, under s 14(1)(b) could have made the necessary adjustments before issuing the assessments under the RPGTA. They did not deem it necessary to do so. Instead they issued the RPGTA certificate of clearance and assessments. Seven years later, the appellant issued notices/assessments under the ITA for the same transactions of the respondent's plantation lands. The earlier RPGTA certificate of clearance and the RPGTA assessments were not revoked. As found by the Court of Appeal, this in effect resulted in double taxation for the same land transactions but under two different legislations, ie once under the RPGTA and later under the ITA. This is clearly an illegality.

[51] In *MR Properties* Raus Sharif J (as His Lordship then was) held:

> 8. In short, the argument by the learned counsel for the appellant is that there is no statutory power for the respondent to 'vacate' an assessment under RPGT and then having done so, to switch to another assessment under the ITA. According to the learned counsel, that the act of the respondent to switch from one Act to another would result in no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction.
>
> 9. To support his argument, the learned counsel for the appellant referred to a number of English cases in particular two Houses of Lords cases of *Garvin v Inland Revenue Commissioners and related appeals* [1981] STC 344 and *Bird and others v Inland Revenue Commissions and related appeals* [1988] STC 312.
>
> 10. The Special Commissioners, as can be seen in the case stated, dealt with the two cases as follows:
>
> > What clearly emerged from Bird and Garvin is strong judicial misappropriation of double taxation. We wholeheartedly agree with the sagacious view of the House of Lord. As Lord Keith said in Garvin, it is not open to the Revenue to subject a taxpayer to two different charges of tax in respect of the same receipts. ...
> >
> > In Malaysia, the relevant laws are specific in their application. The ITA applies only to income and RPGTA applies only to capital gains on real property. The question of subjecting a taxpayer to both the taxes in respect of the same receipt cannot arise. The corollary is that any attempt by the respondent to impose both

taxes will be legally untenable. If the appellant has been subjected to both taxes, the objection by the appellant is perfectly valid.

11. I am in agreement with the above reasoning of the Special Commissioners. I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable. There is also no possibility for a taxpayer being liable to both taxes in respect of the same gain because under the definition of gain under RPGT, it refers to 'gain other than gain or profit chargeable with or executed from income tax'. Thus, if the gain is from the sale of an asset is found to be of an income nature, then the assessment cannot be under RPGT because such gain should be taxed under the ITA. Thus, there is no possibility of a tax payer being liable to both taxes on the same gain.

[52] The appellant argued that they have the power to review the assessments and that the Court of Appeal erred in law in deciding that the ITA assessments resulted in double taxation. It was further argued that the Court of Appeal had failed to consider that the appellant had made the necessary adjustments of the payment made by the respondent under the RPGTA.

[53] We disagreed with the appellant that the Court of Appeal erred in this respect. We found that the Court of Appeal has considered the appellant's submission on the necessary adjustments as apparent in its grounds of judgment reproduced below:

[35] Turning to the facts of the present case, the respondent before us did not dispute that the initial assessment under the RPGTA 1976 was not discharged but went on to submit that the respondent had made the necessary adjustments in consideration of the payment made by the appellant under the RPGTA 1976 and decided to raise the respective assessments under the provisions of the ITA 1967. According to the respondent, they are allowed to do so under the law.

[36] We disagree with the respondent. In our view, as the law stands, the correct procedure in this instance was for the respondent to have revised and discharged the assessment under the RPGTA 1976 and then raise the taxes under the ITA 1967.

[54] The finding of the Court of Appeal in the instant case is consistent with the decision of the Court of Appeal in *Teruntum Theatre* where the Court of Appeal stated thus:

[19] ... there is no rule of law precluding Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. That Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGT and then raise an assessment under the ITA.

[20] On the issue of double taxation, we agree that the position is Malaysia is different from that in England. The ITA applies only to income, whilst the RPGT applies only to capital gains on real property. It has to be one or the other, it cannot

be both. Unlike in England, the question of subjecting a taxpayer to both taxes in respect of the same receipt cannot arise here. The authorities cited by the appellant on this issue are clearly distinguishable.

[55] It was also contended for the appellant that the Court of Appeal erred in failing to consider that the appellant is empowered to raise the assessments under s 91 of the ITA and in that regard further erred in holding that the appellant is estopped from raising the tax under the ITA. We found the submission of learned counsel misplaced. This is not a case where the Court of Appeal found that the appellant is not empowered under s 91 of the ITA to raise assessments against the respondent. This is a case where the Court of Appeal found that the appellant had acted contrary to law by imposing tax on the respondent both under the RPGTA and the ITA which resulted when the appellant failed to discharge the RPGTA certificate of clearance and the RPGTA assessments before revising and imposing tax on the respondent under the ITA.

[56] In *Teruntum Theatre*, one of the issues that arose for determination of the Court of Appeal was whether, after having assessed the taxpayer for real property gains tax under the RPGTA, and upon payment of the sum assessed and a certificate of clearance issued, the Revenue could vacate the assessment and re-assess the appellant for income tax on the same receipt as a trading gain under the ITA.

[57] The crux of the argument in *Teruntum Theatre* which was taken by way of a preliminary issue was that once an assessment for capital gains had become final by reason of the capital gains tax having been paid and certificate of clearance issued, from then onwards, the matter became final and conclusive. It was the taxpayer/appellant's case that the Revenue/respondent was precluded from raising an assessment to income tax.

[58] Referring to the case of *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, the Court of Appeal in *Teruntum Theatre* held that estoppel cannot be invoked against the Revenue/DGIR when he is put to notice that an incorrect assessment has been made under the RPGTA and that the DG cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law. The Court of Appeal further held that there is no rule of law precluding the Revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA, that if the facts and circumstances warrant it, the Revenue is free to revise and discharge the assessment under the RPGT and to then raise an assessment under the ITA.

[59] Learned counsel for the respondent submitted that *Teruntum Theatre*

should be treated as per incuriam as the Court of Appeal did not consider the crucial provisions of 'final and conclusive' of the RPGTA and had misunderstood the Privy Council case of *Maritime Electric*. *Maritime Electric*, according to learned counsel, was completely irrelevant as it was not a tax case nor a public law case.

[60] We were not with the respondent on the *per incuriam* point. We noted that the issue on final and conclusive assessment was submitted by the taxpayer there, and while we disagreed with the Court of Appeal in *Teruntum Theatre* on the point of estoppel (for the reasons set out below), the decision in *Teruntum Theatre* that Revenue may issue assessment under the ITA if the facts and circumstances warrant it, but after discharging the assessment under RPGTA, is consistent with numerous other cases. To that extent, *Teruntum Theatre* is still good law.

LEGITIMATE EXPECTATION/ESTOPPEL

[61] As adverted to earlier, the Court of Appeal in *Teruntum Theatre* referred to an old case of *Maritime Electric*. The same principle that there can be no estoppel against the Crown on tax/revenue matters was also decided in *Government of Malaysia v Sarawak Properties Sdn Bhd* [1994] 1 MLJ 14 ('Sarawak Properties').

[62] Learned counsel for the respondent submitted that the old case of *Sarawak Properties* is no longer good law, particularly in matters where the Revenue by their conduct has exceeded or abused their powers and/or had given rise to legitimate expectation and that the other jurisdictions have moved on in terms of the law on estoppel.

[63] We agreed with the respondent that the law on the principles of estoppel and legitimate expectation in Malaysia, as in other jurisdictions such as India and Hong Kong has evolved (see for example, *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493; *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309; *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116; [2017] 6 CLJ 161).

[64] In the instant case, the appellant had taxed the respondent under both the legislations of RPGTA and the ITA. The position taken by the appellant is that they should not be estopped from performing their statutory functions and that the Court of Appeal should have preserved the status quo of both

assessments under the RPGTA and the ITA until the determination by the courts, which is the principle and spirit of the decision in *Teruntum Theatre*.

[65] The effect of upholding the appellant's position is that the respondent will be subjected to tax under both the RPGTA and the ITA. This is contrary to law as it is trite that in Malaysia, a taxpayer can only be taxed either under the RPGTA or the ITA and that there can be no overlap between the RPGTA and the ITA.

[66] Further, to accept the appellant's submission that the RPGTA certificate of clearance and the RPGTA assessments be held in abeyance, would render s 20 of the RPGTA Act completely redundant. The position taken by the appellant is not supported by law as there is nothing in the RPGTA that speaks of holding the RPGTA certificate of clearance and assessments in abeyance.

[67] Our reading of *Teruntum Theatre* also did not support the appellant's contention that having applied both tax legislations of the RPGTA and the ITA, the assessments must be held in abeyance until the dispute is determined. What was decided in *Teruntum Theatre* was that the Revenue is, if the facts and circumstances warrant it, free to revise and discharge the assessment under the RPGTA and to then raise an assessment under the ITA.

[68] The issue that the appellant could not be estopped from performing its statutory functions did not arise here as the appellant is only expected to perform its function as required by law and not otherwise. On the facts, the appellant had clearly taxed the respondent under both the RPGTA and the ITA. As alluded to earlier, it is illegal for the appellant to do so, as in effect, it amounts to double taxation.

[69] Further, it was not disputed that the respondent has been given assurances multiple times over a period of seven years from 2011 to 2018 that all the transactions are indeed capital in nature. In *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327, the House of Lords held:

> ... judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of representation giving rise to an estoppel. Such a decision could be an abuse of power; whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide ...
>
> In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an

abuse of power for which in the present case judicial review is the sole remedy and appropriate remedy ...

[70] In *MFK Underwriting Agencies,* the House of Lords stated thus:

It was not inconsistent with the Revenue's statutory duty for the Revenue to advise a taxpayer as to his rights and duties where an approach was made by the latter for such advice. However, if a public authority so conducted itself as to create a legitimate expectation that a certain course would be followed, it would be unfair if the authority were permitted to follow a different course to the detriment of the person who entertained the expectation, particularly if he acted on it. Accordingly, if the Revenue agreed to, or represented that it would, forgo tax which might arguably be payable on a proper construction of the relevant legislation, and the taxpayer relied on such agreement or representation, the Revenue would be bound by that agreement or representation and a decision to resile therefrom would be unfair and subject to judicial review on the ground of abuse of power ...

... The doctrine of legitimate expectation is rooted in fairness. ...

[71] In *Darahman*, the Court of Appeal referred to among others, *MFK Underwriting Agencies* on the issue of legitimate expectation. The Court of Appeal held thus:

... A taxpayer, for instance, must rely upon a representation from the Revenue before his expectation will be protected ...

...

... I now revert back to the doctrine of legitimate expectation. This doctrine is often used in the field of public law. If used wisely, this doctrine serves as an effective weapon in challenging decisions of public bodies. If a decision is adverse to the person affected, it must follow a procedure that is fair. ...

The following principles of law must be advanced:

(a) There should be such unfairness as to amount to an abuse of power. If a statement has created a legitimate expectation that a certain decision will be taken or that decision will be taken on the assumption that a certain fact is true, it will often be unfair and an abuse of power to resile from it. The court will act and will impose the requirement of fairness on the public body concerned.

(b) The requirements giving rise to a legitimate expectation must be present. These requirements are similar to the requirements of estoppel in private law ... The requirements are — that the body concerned made a representation which was clear, unambiguous and devoid of qualification: that the Applicants was within the category of people to whom it was made and that it was reasonable for him or her to rely on the representation and that the representee relied on such representation to his or her detriment.

(c) ...

(d) It is for the court to decide whether there is overriding reason for frustrating the legitimate expectation. In doing so, the court must always put to the forefront the question of fairness.

[72] Learned counsel for the appellant sought to rely on *Bye* to argue that the appellant was not precluded from raising an assessment under the ITA after the finalisation of capital gains tax. With respect, *Bye* is distinguishable. In *Bye*, the capital gains tax assessments were issued as an alternative to the income tax assessments and the taxpayers were fully aware about this at the outset. Here, at the risk of repetition, the appellant shifted their position after seven years against the legitimate expectation of the respondent.

[73] Applying *Darahman* and the other cases cited above, the appellant's certificate of clearance and assessments under the RPGTA which were never discharged or revoked, has created a legitimate expectation on the part of the respondent that they are correct and the appellant is now estopped from shifting its position. And to the extent that *Teruntum Theatre* and *Sarawak Properties* decided that estoppel cannot be invoked against the Revenue, we found that they are no longer good law.

DOMESTIC/ALTERNATIVE REMEDY

[74] On alternative remedy, the Court of Appeal held that there is no acid test applicable in judicial review applications and that if a good case is brought before the court for review, for instance, if there is clear illegality on the part of the decision-making authority, then it is in the interest of justice that such application be allowed. The Court of Appeal found that on the facts of the present case, the decision of the appellant in issuing the disputed notices was tainted with illegality.

[75] There was no error committed by the Court of Appeal in dismissing the appellant's contention that this was not a proper case for the respondent to bypass the avenue to appeal to SCIT. The finding of the Court of Appeal is supported by the authorities (see *Jagdis Singh*; and *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 ('Sungai Gelugor').

[76] In *Jagdis Singh*, Hashim Yeop A Sani SCJ (as he then was) said:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[77] In *Sungai Gelugor*, this court stated thus:

> The reason for this is that whilst in theory the courts there frequently recite the incantation that alternative remedies must be exhausted before recourse may be had to judicial review, in practice, the courts are often much kinder to the applicant with a good case on the merits, who is faced with this hurdle to clear and will most probably entertain this application as an exception ...
>
> ... Speaking generally, it is right to say that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of judicial review rather than appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest.
>
> ... Having said that we recognise that there are certain classes of cases such as planning, employment cases and tax cases ... where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess of power, or breach of the rules of natural justice.

[78] Citing *Alcatel-Lucent*, the appellant argued that the High Court did not err in deciding on the merits of the case. We found that the reliance by the appellant on *Alcatel-Lucent* was misconceived. The case of *Alcatel-Lucent* does not support the appellant. In *Alcatel-Lucent*, the taxpayer succeeded in their judicial review application before the High Court where they sought for an order of Certiorari to quash the decision of the Revenue to levy withholding tax. The decision of the High Court was affirmed by the Court of Appeal. On Revenue's appeal to this court, it was found among others, on the merits, that there was no flaw detectable in the decision-making process and there was also no illegality or irrationality in the decision of the Revenue. The existence of a domestic remedy did not form part of the ratio of this court's decision.

[79] Hence, *Alcatel-Lucent* is not the authority for the proposition suggested by the appellant that the courts could decide on the merits and the same can still be determined by SCIT. In any event, the appellant's decision in the present case, as found by the Court of Appeal, was tainted with illegality. Thus, the matter was rightfully brought by the respondent by judicial review to quash the illegal decision.

[80] Learned counsel for the appellant's submission that complaints on legitimate expectation are matters that should be raised and determined by the SCIT is also devoid of any merit.

A CONCLUSION

[81] We found no appealable error by the Court of Appeal that warrants our appellate intervention. The effect of the appellant's decision in issuing the disputed notices and in charging the respondent under both the RPGTA and the ITA amounted to an illegal act and contrary to the principle against double taxation. We agreed with the Court of Appeal that the principle of estoppel should apply against the appellant.

[82] We further agreed with the Court of Appeal that the High Court erred in concluding that the proper forum is SCIT and in taking a contradictory stand by dealing with the merits herself. Having found that the merits are appropriately for the SCIT to determine, the High Court should not have proceeded to decide on the issues of negligence, limitation and sinister or bad faith.

[83] We therefore unanimously dismissed the appeal with costs. We declined to answer the leave questions.

Abu Bakar Jais FCJ (delivering supporting judgment of the court):

INTRODUCTION

[84] The main written judgement for this case has been prepared and drafted by our learned sister, Tengku Maimun Tuan Mat CJ and my learned sister, Rhodzariah Bujang FCJ and I agree to the same. In turn, this written judgement supporting that main written judgement deals with only two issues in support of our unanimous decision to dismiss the appeal. The first is on the issue of estoppel/legitimate expectation. The second is on the issue of whether in the first place the substantive matter must be heard by the Special Commissioners of Income Tax ('SCIT') before it is litigated at the High Court ('HC'). The material facts of this case are already alluded to in the main written judgement. There is no reason to repeat the same.

ESTOPPEL AND LEGITIMATE EXPECTATION

[85] Essentially the argument by the respondent on this point is that the appellant could not further act in imposing additional income tax on the former pursuant to the Income Tax Act 1967 ('the ITA'). This is because the appellant had earlier imposed real properties gain tax ('RPGT') under the Real Property Gains Tax Act 1976 ('the RPGTA') on the sale of the relevant lands by the respondent and this tax had been paid. The appellant also issued a certificate of clearance pursuant to the RPGTA for this payment made by the respondent. This certificate was never revoked by the appellant. Under such

circumstances, the respondent argued that estoppel would apply against the appellant preventing them to impose further or additional tax pursuant to the ITA and there is legitimate expectation for the respondent that additional tax could not be imposed by the appellant pursuant to the ITA.

[86] The appellant on the other hand submitted, additional income tax could be imposed under the Income Tax Act 1967 ('the ITA') as the proceeds from the sale of the lands constituted business income and the respondent's activities of realising its investment were in the nature of trade. Essentially the appellant contended that the sale of the lands was not disposal of capital assets subject to RPGT but disposal of stock in trade subject to income tax.

[87] In our view, since the appellant had accepted the RPGT returns filed by respondent and also issued RPGTA certificate of clearance, this would reflect that the appellant had acted on the basis of s 14(1)(a) of the RPGTA that states as follows:

> (1) Where a person makes a return under section 13 (1), the Director General may:
>
> (a) accept the return and make an assessment accordingly;

[88] Further, since there were no appeals filed by the respondent, the assessment became final and conclusive pursuant to s 20(1) of the RPGTA that states as follows:

> (1) Subject to this section, an assessment shall become final and conclusive for all the purposes of this act as regards the amount of the tax assessed under it or the allowable losses indicated in it, as the case may be:
>
> (a) on the expiry of the time for appeal against the assessment; or
>
> (b) where an appeal is made, on the appeal being finally disposed of.

[89] We are of the opinion estoppel would set in against the appellant. In the circumstances of the present case, estoppel *in pais* (estoppel by words or conduct) would apply here, preventing the appellant to impose the tax under the ITA. Once the RGPT is imposed and the certificate of clearance is issued, the appellant would be estopped from imposing further tax under the ITA. There would also be legitimate expectation that the respondent would not be required to pay further tax under the ITA as the RPGT had been paid and the certificate of clearance had been issued for this payment, none other by the appellant.

[90] In this regard, it is also relevant to note that Raus Sharif J (later CJ) in *MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2005] 7 MLJ 260 said:

I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable.

[91] There is another relevant point to consider regarding further notices for tax under the ITA raised by the appellant and after not discharging or revoking the earlier RPGTA certificate of clearance and assessments. This is related to the fact it has resulted in the same land transactions being subjected to tax under the said two different legislations.

[92] That action and conduct of the appellant is clearly illegal and must amount to double taxation.

[93] We also could not agree with the appellant that the Court of Appeal case of *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685 supports the contention that the RPGTA certificate of clearance and RPGTA assessments can be held in abeyance pending the court's final determination on whether the land transactions should be taxed under the RPGTA or the ITA. One would not be able to discern this if one reads the whole of this case. There is nothing in the same to suggest that the certificate and the assessment can be held in abeyance as submitted by the appellant based on this case.

[94] On a more serious note, this contention of the appellant if accepted, would mean the finality provision in s 20(1) of the RPGTA on the assessment for RPGT as narrated earlier is of no effect.

[95] In any event, there is no provision in the RPGTA that stipulates RPGTA certificate of clearance and RPGTA assessments can be held in abeyance.

SCIT OR HC

[96] The Court of Appeal ('COA') was also not in error in finding that the existence of a domestic remedy will not bar an application for judicial review. Therefore, there is no obligation for the respondent to go before the SCIT prior to seeking the appropriate remedy by way of judicial review before the HC. The COA is also not erroneous in finding there is no requirement in O 53 of the Rules of Court 2012 ('the ROC 2012') that the availability of a domestic remedy will bar an application for judicial review.

[97] The courts have long acknowledged, based on landmark Supreme Court and Federal Court decisions, that the availability of an alternative internal remedy in the form of an appeal process will not be a complete bar of

an application for judicial review. In this regard the COA had correctly referred to the Supreme Court decision in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1987] CLJ Rep 110 where Hashim Yeop A Sani SCJ said as follows:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[98] The COA also correctly referred to what were said by Edgar Joseph Junior FCJ in delivering judgement in the Federal Court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 as follows:

> Having said that we recognise that there are certain classes of cases such as planning, employment cases and tax cases (see, eg *R v Commissioner for the Special Purposes of the Income Tax Acts; ex p Napier* [1988] 3 All ER 166; *R v Epping Forest DC; ex p 'Green* [1993] 1 COD 81) where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review *but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice* (see *Accountant in bankruptcy v Alls of Gillock* [1991] SLT 765 *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708). (Emphasis added.)

[99] Thus, judicial review would still be applicable following the above decision when there is excess or abuse of power. In the present case before us, there is indeed an excess or abuse of power as the appellant should not have further imposed tax on the respondent under the ITA, having done so under the RPGTA. Therefore, the appellant should not be prohibited in applying for judicial review.

CONCLUSION

[100] The determination on these two issues as explained above would mean the appeal must be dismissed.

[101] The appellant action in imposing tax under the ITA should be estopped and the appellant action in imposing the tax under the RGPTA had provided the respondent a legitimate expectation that tax under the ITA would not be further imposed.

[102] The respondent action in filing the judicial review application at the HC is also permissible without the need to go before the SCIT.

Appeal dismissed with costs; court declined to answer leave questions.

Reported by Dzulqarnain Ab Fatar